

14th February, 1759.

Unto the Right Honourable, the Lords of Council and Session,

THE

P E T I T I O N

Prescription of
a Bill — O F

William Cuninghame of Craigends, and others,
Trustees of the deceast George Houstoun
of Johnston; and of George Houstoun Ne-
phew and apparent Heir of the said de-
ceast George Houstoun;

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Humbly sheweth,

THAT George Houstoun of Johnston, now deceast, having
been charged at the Instance of Hugh Stenart of North-
woodside, Esq; for Payment of the Sum of 15 l. Sterling of
Principal, contained in a Bill accepted by the said George Hous-
toun, of Date, 5th March 1728, with Annualrents thereof,
and of 10 l. Sterling alledged due to the Charger, as paid by
him to Hugh Wilson, by Order of Johnston, 30th July 1729,
besides Damages and Expences of Process, all contained in
a Decreet, in absence, obtained against Mr. Houstoun, on the
12th Day of February 1755; he, the said George Houstoun,
immediately after the Charge, brought a Suspension thereof,
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wherein he denied the Existence of the Debts charged for, and further pled Prescription, the Bill being no less than twenty seven Years old, and the Order twenty six.

5th Dec.
1758.

That this Suspension being passed, the Charger allowed the same to lye over till lately, that, the original Suspender being dead, he transferred the Process against *Johnston's* Nephew and Heir apparent, and his Tutors and Curators, and the Cause coming of Course before the Lord *Shevalton*, his Lordship, in absence of the Suspender's Procurator, pronounced an Interlocutor, finding the Letters orderly proceeded.

6th Feb.
1759.

But a Representation being preferred in name of your Petitioners, the Trustees appointed by the late *Johnston* to manage his Estate for the Use of his Heir and Creditors, the Lord Ordinary, upon advising the same, with Answers, pronounced the following Interlocutor; "Repells the Reasons
" of Suspension, and finds the Letters orderly proceeded for
" the 15 *l. Sterling* contained in the Bill charged on, and
" for the Annualrents thereof, since the 5th of *May* 1728
" Years, and, in time coming, during the not Payment,
" sustains the Reasons of Suspension, and suspends the Letters
" *simpliciter*, *quoad* the 10 *l. Sterling* charged for, contain-
" ed in *George Houstoun's* Missive, addressed to the Charger,
" and Receipt subjoined thereto, and also *quoad* the 10 *l.*
" *Sterling* of Expences of Plea, assoilzies from these two Ar-
" ticles of the Charge, and decerns."

The Petitioners humbly beg Leave to submit the first Part of this Interlocutor, finding the Letters orderly proceeded as to the Bill, to the Consideration of the Court. This they think incumbent upon them, as Trustees acting for Behoof of others, and more especially, as they are perfectly convinced, from the whole Circumstances of the Case, that this Debt, if it ever existed, must have been long ago extinguished.

That the Petitioners are, in the most favourable Circumstances, to plead Prescription, they will endeavour in the Sequel to show: In the mean time, as to the general Point, they conceive



conceive it to be clearly established by the Decisions of this Court, and the Practice of Merchants, founded upon the very Nature, original Design, and Use of Bills, that where a Bill is allowed to ly over upwards of twenty Years unnegotiated, and without any Demand of Payment, Prescription takes Place, and it is no longer a Foundation of Debt. The Petitioners apprehend, they might go further, and say that twenty Years is by far too long a Term of Endurance for Bills, and that here, as in all other Nations, their Currency ought to be limited to a very few Years.

The Practice of Merchants introduced Bills of Exchange. This was plainly a Deviation from the common Law of *Scotland*, according to which a Bill is a null Deed, being contradictory to the Acts 1593, c. 175, 1681, c. 5.; and the other Statutes, establishing the Solemnities of probative Writings. They were, however, found to be of great Service in Commerce, as being a safe and easy Method of transmitting Money from Hand to Hand, they were therefore universally received in the trading Nations of Europe, and of consequence introduced into this Country. No particular Enactment was here made concerning them, except in one particular Instance, where an extraordinary Privilege is super-added to foreign Bills of Exchange, in case of Registration, within six Months, by Act 1681. c. 20. and the same is extended to *Inland* Bills by a subsequent Act, with regard to all their other Privileges; the Preamble of these Statutes refers to the Custom of other trading Nations. It is therefore, with Submission, apprehended, that, in all Questions relating to Bills, where the Point is not particularly defined by our own Law or Custom, the Rule of Determination must be the Practice of Nations, compared with the Nature and original Design of these Writings.

The sole End and Purpose, as the Petitioners apprehend, of authorizing these informal Deeds, called *Bills*, is the good of Commerce, that Money may be easily and expeditiously transmitted. This is so far from being a Reason why they should be indulged

indulged with a long Currency, that it is a Reason for the Reverse. They are intended to circulate in the quickest Manner, and the good of Commerce evidently requires, that they should be punctually and speedily negotiated: When they are taken to ly over, as Securities, Commerce, and the Circulation of Money, comes to be intirely out of the Question, and the Reason of their Introduction totally ceases. Upon these Principles the Practice of Nations is built; in *England*, Bills are limited to six Years, in *Holland* to seven, in *France* to five, and in no Nation of the Universe, so far as the Petitioners can learn, are they held as probative for twenty Years. In *Scotland* they are an Exception to the Statute Law, copied from the Practice of other Nations, and this Exception ought to be no broader than such Practice will support it.

If this Doctrine be good, with regard to Bills of Exchange, it will apply in a much stronger Degree to that anomolous Species of Bills, in which two Persons only are concerned; these kind of Bills are not calculated for the Transmission of Money, but to supply the Place of a Security for Money, they are of little or no Use in Trade, they are merely an Instrument of Debt, and do not otherwise differ from a Bond, than as the one is a formal Document, and the other absolutely informal. They have crept into Practice in this Country, in defiance of our Statute Law, which requires fundry Solemnities to all such Writings; and the Petitioners cannot help thinking, that your Lordships would answer the Intention of the Law, in not sustaining them at all, any more than a Bond without Witnesses. To sustain them, as probative for forty Years, would surely be unreasonable, and productive of many bad Consequences.

The Legislature has thought it necessary, in order to prevent Fraud and Forgery, to establish certain Solemnities, without which Writings, especially such as are intended for Securities, shall bear no Faith: The only View in which Bills, between two Persons (which have none of these Solemnities) can be at all justified, is, that they are generally taken payable at a very short Day, and
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are intended then to be withdrawn, and not be kept as permanent Securities: It is therefore demonstrable, that they ought to be limited to a very short Term of Endurance. Bills of this Kind are the most informal of all Writings; there is nothing more common than for Country People to subscribe Bills by affixing their Marks or the initial Letters of their Names. Such Writings may be fabricated with Abundance of Ease, and if they were to be held as probative for forty Years, it would be no difficult Matter for a Man, of any Genius, to enrich himself, and his Posterity, by framing Bills, and letting them ly over till it should be impossible to discover the Falshood; if they are limited to a short Term, such Practices may be easier detected.

Agreeable to these Principles, all our Lawyers, who have wrote upon the Subject of Bills, have delivered it as their Opinion, that they are not probative after the Lapse of any considerable Number of Years. Lord *Stair*, *Pag.* 687, says, That “ Bills of Exchange are probative, though neither Holograph, “ nor having Witnesses insert, nor subscribing, because of the “ exuberant Trust among Merchants, and the speedy Dispatch “ which their Affairs require, whereby such Bills use not to be “ kept for any considerable Time, and, if they were so kept, “ they would not be probative, *and because it is the general Custom of Nations*, which particular Statutes cannot remied.” The learned Author of the late Institutes is of the same Opinion. Sir *George Mackenzie*, indeed, in his Observations upon the Act 1669, c. 9, says, that the Parliament refused to limit Bills of Exchange to the vicennial Prescription “ because these “ being the Vehicles and Supports of Trade betwixt us and Foreigners, that were to limit them by too narrow Statutes;” but it is not surprizing, that our Ancestors, in the Infancy of Trade, and when Bills were new, should not foresee the Inconveniencies that might flow from allowing them to have so long a Currency: At present it is plain to every one, that supposing a Bill were drawn in the most distant Country, upon a Man in *Edinburgh*, it could not possibly take twenty Years in negotiating.

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Besides the Reason assigned by Sir *George* applies to foreign Bills only. *Forbes*, in his Treatise on Bills, reasons much more justly, when he says, that they ought to prescribe sooner than Holograph *Writings*, as both wanting Witnesses, and seldom Holograph.

Upon the same Principles, your Lordships have been constantly in use to deny Action upon Bills that have lain over upwards of twenty Years, especially where the Acceptor happens to be dead, since the Heir cannot be supposed to know any thing either of the Constitution or Existence of the Debt. A Variety of Decisions has established this Point; the Petitioners shall only mention three, viz. 11th February 1747, *Gordon*; 31st January 1749, *Wallace*; 13th December 1751, *Moncrieff*: Nor did your Lordships, by the late Decision, *Hamilton* against *Hamilton*, make any Variation in this Rule, for there Mr. *Hamilton* owned that he had accepted the Bill, and gave no account to your Lordships Satisfaction, with regard to his having discharged it, the Pursuer, on the other Hand, gave a probable Reason for its having lain over so long, and the Bill was barely twenty Years old.

What the Petitioners have hitherto urged, is independent of the particular Circumstances of the Case, which, however, afford the strongest Presumption, and next to a Proof, that this Debt, if it ever existed, was actually long ago discharged; at least, it appears so to the Petitioners, for *Johnston* himself being dead, it is become impossible to say, positively, whether this be the Case or not. The late *Johnston*, when charged for the Debt, absolutely refused that he was owing the Charger a Shilling, and, in his Bill of Suspension, asserts, that, if he did grant the Bill, he paid Value for it in Lime, a Quantity of which he furnished to the Charger, soon after the Bill bears to be dated, as would appear from his Lime-books.

Certain it is, that *Johnston* was Proprietor of a considerable Lime-work, and as the Charger lived then in the Neighbourhood, he frequently had Occasion to furnish him with this

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Commodity, unluckily these Lime-books are not now to be found, the Person who had the Keeping of them being dead, as well as *Johnston* himself, but that *Johnston's* Assertion was true, appears sufficiently from the Order or Letter sent by him to Mr. *Steuart* for the 10 *l.* mentioned above, which was a Part of this Charge, and as to which the Lord Ordinary has suspended the Letters, it is dated about a Year after the Bill, and is conceived in the following Words: " Sir, " I give you the Trouble of this, to see if ye can do me the " Favour as to send me 10 *l.* by the Bearer. I know it is very " far wrong in me to desire any Money of you, *considering* " *that I am owing you more too long*, but you shall have another Kiln against the Middle of the next Week, of 20 Chalder, and I am begun to set another of 34 Chalder, which " I am resolved to caw (*id est*, Lead) to you in the Time of " Harvest, upon Horses Backs, so GOD willing, your Money " shall be thankfully paid to you before the latter End of " Harvest, which is all from your most humble Servant, while " I am, (signed) *George Houston*: Addressed to Mr. *Hugh Steuart* the Charger, and to which is annexed the following " Receipt: Received 10 *l.* Sterling, as the Contents of the " within Letter, (signed) *Hew Wilson*.

30th July
1729.

This Order shows, that *Johnston* was then owing the Charger a Sum, besides the 10 *l.* then received, in all Probability, the Bill in question; but it also shews, that *Johnston* proposed to pay him for both, the very Week after, by furnishing him with a Quantity of Lime. The Charger, who, at this Time, had a very considerable Farm in *Johnston's* Neighbourhood, and made Use of great Quantities of Lime, cannot deny that he often was furnished in Lime by *Johnston*; nay, in the Debate before the Lord Ordinary, he did not pretend to refuse this; but insisted, that, it was to be presumed, he paid ready Money for the same: The Petitioners shall not pretend to dispute, but Mr. *Steuart* was abundantly punctual in his Payments, only they will submit it to your Lordships, how far it is probable, that

that he would pay the whole Value, without deducing these Sums, which, it appears, he lent to *Johnston*, expressly upon the Faith of the Lime.

The late *Johnston* was a plain honest Man, but by no means distinct and accurate in the Management of his private Affairs; and it is no Novelty, among Country Gentlemen, not much versant in Business, where their Debts are extinguished by Accompts or Compensation, to neglect the retiring the Documents of Debt, or settling their Accompts; it is most likely, that this was the Case here, the Petitioners cannot think, that the Charger would otherwise have kept these Documents for twenty-seven Years in his Pocket, without any Demand of Payment; *Johnston*, though sometimes straitened, was far from being in bad Circumstances, he was possessed of a Land Estate of about 240 *l. Sterling*, besides a Coal that is set in Lease, for 200 *l. Sterling* yearly, and his Heir will, it is hoped, still have a very considerable Reversion of his Land Estate, besides the Coal.

The Charger can assign no probable Cause for so long a Taciturnity; it was urged, indeed, that he had been indulgent to his Neighbour, that he did not chuse to put him to distress, and that, besides, the Charger had been long in a bad State of Health, which had made him unattentive to his Affairs, but these are Excuses, that will not go down with your Lordships, such Pretences are easily made, and might apply equally to every Case of this kind; it was certainly carrying his Indulgence very far, not to give the least Hint for twenty-seven Years, that this Debt was owing; and, with regard to his State of Health, it is very true, that for five or six Years past, (but not before that) he has been valetudinary, and his Memory is now very much impaired, which accounts extremely well for his making the present Demand: The Petitioners are persuaded it is intirely owing to his having forgot the Transaction of the Lime.

That *Johnston* never considered himself as indebted to the
Charger,

Charger, appears from this other Circumstance; that, in the Year 1750, he resolved to borrow a Sum upon real Security, sufficient to discharge his whole Debts, and, in order to this, a List was made up, and delivered to his Doer, of all his Debts personal or real, that he could then think of: The Sum of 2500 *l. Sterling*, was accordingly borrowed, and all his Debts, at that Period, cleared off; but none such, as that now charged for, was contained in that List, or was ever thought off by him.

Your Lordships every Day cut off Debts upon strong Presumptions of Payment, though the Evidence of the Debt be found in the Hands of the Creditor, and there cannot well be stronger than in the present Case; where the Document of Debt is a Bill, the Petitioners humbly apprehend, that Taciturnity alone, for any considerable Time, is a sufficient Presumption against it. The Charger himself seemed to admit this to be the Case, where a good Cause is not assigned for the Delay, and insisted, chiefly, that he had shown a sufficient Cause, *viz.* his Tendernefs to his Neighbour, and his own bad State of Health, for a few Years past; whether this be a relevant Excuse for so long a Taciturnity, and, on the other Hand, whether the whole Circumstances of the Case do not afford something more than a Presumption, that this Debt is not due, the Petitioners will submit to your Lordships.

MAY it therefore please your Lordships, to alter the Lord Ordinary's Interlocutor, and to suspend the Letters simpliciter.

According to Justice, &c.

I, LAY CAMPBELL.

appears from this other Circumstance; that in the
year 1750, he refused to borrow a Sum upon real security,
sufficient to discharge his whole Debt, and in order to this
a Bill was made up, and delivered to his Debt, of all his
Debt's personal estate, that he could then think of: The Sum
of 2500 L. Sterl. was accordingly borrowed, and all his Debt's
at that Period, cleared off; but none such as that now char-
ged for, was contained in that Bill, or was ever thought off
by him.

Your Lordships every Day are off Debt upon strong Pre-
sumptions of Payment, though the Evidence of the Debt be
found in the Hands of the Creditor, and there cannot well be
stronger than in the present Case; where the Document of
Debt is a Bill, the Petitioner's hands are apprehended that a
claiming alone for any considerable Time, is a sufficient
Presumption against it. The Charge himself seemed to ad-
mit this to be the Case, and a good Cause is not assigned
for the Debt, and it is chiefly, that he had been a late
owner of the said Debt, and his name to his Neighbour, and his
own had some of the Debt a few Years past; whether this
be a relevant Evidence for so long a Testimony, and on the
other Hand, whether the whole Circumstances of the Case do
not afford something more than a Presumption, that this Debt
is not due, the Petitioner will submit to your Lordships.

ALL I therefore please your Lordships, to shew the
Lord Ordinary's Instructions, and to suspend the Ex-
ecution.

According to Justice, &c.

J. LAY CAMPBELL.